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# Israeli Exception-alism: The Nation-State Law and its Place in the Israeli Geopolitical Zeitgeist

BY DANIEL BRAL\*

*Abstract:* Israel is no stranger to the scorn of the international community. In many respects, Israel is held to a different standard than other nations. In July 2018, that hypothesis was tested when Israel’s Knesset passed The Basic Law: Israel – The Nation State of the Jewish People. Though largely symbolic, the Law declares, *inter alia*, “[t]he exercise of the right to national self-determination in the State of Israel is unique to the Jewish People.” Critics lambasted the clause for allegedly violating international law by rejecting non-Jews’ right to exercise self-determination in the State of Israel. This note argues that the clause complies with international law because the Palestinians’ right to national self-determination is linked to a future Palestinian state. The British Mandate, the Partition Plan, and international law have all recognized Israel as the homeland of the Jewish people, where Jews exercise their exclusive right to national self-determination. Palestinians and other non-Jews, like minority populations in other nations, may exercise the right to *internal*, not national, self-determination in the State of Israel. Yet still, to the Law’s critics, its passage marked the official downfall of Israeli democracy, which begs the question: why is Israel challenged when it seeks to join the host of nations who have similar nationhood provisions? Is Israel, as a sovereign nation, not entitled to the same privileges or proclamations of nationhood?

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\* Daniel Bral earned his J.D. from Loyola Law School in 2020 where he proudly served as the Executive Editor of Loyola’s International and Comparative Law Review for Volume 43. *Israeli Exception-alism: The Nation-State Law and its Place in the Israeli Geopolitical Zeitgeist* was written in late 2018 and completed in early 2019. This note would be hollow if not for the incalculable contributions made by Professors Laurie Levenson and Ronda Fox, Ms. Laura Cadra, and the entire International Law Review Staff.

## I. A HURDLE ON THE ROAD TO PEACE

When the stability of an entire region hangs by a thread, every action demands microscopic attention. In July 2018, dreams of a peaceful resolution to the Israeli-Palestinian conflict seemingly came to a halt when Israel's Knesset passed The Basic Law: Israel – The Nation State of the Jewish People (hereinafter Nation-State Law or the Law).<sup>1</sup> Facially, the Law may evoke shrugged shoulders for its truism, for *most* of the world already accepts (enthusiastically or grudgingly) Israel's singular identity as a Jewish state. Jewish, but equally sacrosanct for Muslims and Christians. Due to that mystical character, Israel, and the lens through which we judge it, is in a class of its own. The focus of this note is on the one clause in the Nation-State Law that has ignited the most controversy among Jews and non-Jews alike: “The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People.”<sup>2</sup>

Israeli Prime Minister Benjamin Netanyahu celebrated the Nation-State Law as “a pivotal moment in the annals of Zionism and the State of Israel.”<sup>3</sup> Others, including Jews, were disillusioned and accused Israel of codifying discrimination.<sup>4</sup> Critics lambasted the clause, which rejects non-Jews' right to exercise national self-determination in the State of Israel, for allegedly violating the International Covenant on Civil and Political Rights (“ICCPR”), numerous United Nations (“U.N.”) resolutions, and international law writ large.<sup>5</sup> Yet, as this note will discuss, the clause complies with international law because the

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1. Basic Law: Israel - the Nation State of the Jewish People, 5779-2018, SH No. 2743 (Isr.).

2. *Id.*, Basic Principles 1 (c).

3. Press Release, The Knesset, Knesset Passes Jewish Nation-State Bill into Law (July 19, 2018), [https://www.m.knesset.gov.il/en/news/pressreleases/pages/pr13979\\_pg.aspx](https://www.m.knesset.gov.il/en/news/pressreleases/pages/pr13979_pg.aspx) (Isr.).

4. Eric Cortellessa, *Reform and AJC Leaders Bitterly Criticize Israel's Nation-State Bill*, TIMES ISRAEL (July 19, 2018, 8:13 AM), <https://www.timesofisrael.com/us-jewish-group-deeply-disappointed-with-nation-state-bill/>; David M. Halbfinger & Isabel Kershner, *Israeli Law Declares the Country the 'Nation-State of the Jewish People'*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html?module=inline>; Miriam Berger, *Israel's Hugely Controversial "Nation-State" Law, Explained*, VOX (July 31, 2018, 8:57 AM), <https://www.vox.com/world/2018/7/31/17623978/israel-jewish-nation-state-law-bill-explained-apartheid-netanyahu-democracy>; TOI Staff, *Arab Israeli MKs Said Set to Appeal to EU to Oppose Jewish Nation-State Law*, TIMES ISRAEL, ¶ 18 (Aug. 31, 2018, 9:11 PM), <https://www.timesofisrael.com/arab-israelis-said-to-appeal-to-eu-to-oppose-jewish-nation-state-law/>.

5. See Madeleine Lusted, *Israel's 'Nation-State Bill': A Divergence from International Law?*, OXFORD HUM. RTS. HUB: BLOG (Sept. 14, 2018), <http://www.ohrh.law.ox.ac.uk/israels-nation-state-bill-a-divergence-from-international-law/>.

Palestinians' right to national self-determination is linked to a future Palestinian state; the language of the Law does not preempt that right.

Article 1 of the ICCPR, adopted and ratified by the U.N. General Assembly (“UNGA”) in 1966, provides, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>6</sup> Self-determination comes in varying degrees; depending on the type of self-determination – internal or external<sup>7</sup> – “peoples” may either exercise autonomy within a country, or in the most exceptional cases, secede.<sup>8</sup> As discussed herein, the terms “peoples” and “self-determination” have vexed the international community because they lack clear definition and scope. Namely, what constitutes “peoples”? What is “self-determination,” how does one exercise it, and how does it differ from equality? What does “unique” mean as it stands in the Basic Law? Despite the interpretive obscurity, the U.N. and the international community have unequivocally held that Palestinians are “peoples” who have an inalienable right to “self-determination.”<sup>9</sup> In fact, that right has been reaffirmed *ad infinitum* by the UNGA, as recently as March of 2018.<sup>10</sup>

This note does not challenge the settled fact that Palestinians have a right to self-determination. It is also not an examination of every clause in the Nation-State Law, nor an appraisal of Israeli settlements and actions in the Occupied Palestinian Territories (“OPT”). Rather, this note posits that Israel’s Nation-State Law, specifically the clause that declares “the right to national self-determination in the State of Israel is unique to the Jewish People,”<sup>11</sup> does not violate international law simply because Palestinians’ right to national self-determination is tied to a future Palestinian state, not the State of Israel. While there is a colorable argument that Israel’s settlement-building in the OPT, combined with other intractable facets of the Israeli-Palestinian conflict, renders the prospects of a Palestinian state unlikely at this time, the

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6. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 1, (Dec. 16, 1966).

7. This note will use the term “external self-determination” and “national self-determination” interchangeably.

8. See Milena Sterio, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, ASIL INSIGHTS (Jan. 5, 2018), [https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan#\\_ednref8](https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan#_ednref8).

9. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 182-183, 197 (July 9) [hereinafter, I.C.J. Advisory Opinion].

10. Human Rights Council Res. 37/34, U.N. Doc. A/HRC/RES/37/34, at 2 (Mar. 23, 2018).

11. Basic Law: Israel - the Nation State of the Jewish People.

clause in the Nation-State Law that references the right to national self-determination in the State of *Israel* does not in itself deny Palestinians their internationally recognized right to self-determination in their promised state.

This note begins by exploring the Nation-State Law's contentious legislative history. The Law was debated in the Knesset for seven years prior to being enacted.<sup>12</sup> The Law drew inspiration largely from Zionist principles, namely the Jewish people's right to self-determination, and the British Mandate, which established Israel as the homeland of the Jewish people.<sup>13</sup> Part Two also provides an overview of the current state of the Israeli-Palestinian conflict. Once Israel became a reality in 1948, peace effectively turned into a pipedream. In the same year that Israel declared its independence, Israel found itself enveloped in the first of several regional wars to come. The dust still has not settled. The Nation-State Law passed against the backdrop of heightened domestic tensions between Israelis and Palestinians and increased international condemnation of Israel's actions. Israel has even been accused of being an apartheid state for the alleged "oppression of the Palestinian people."<sup>14</sup> This criticism has been spearheaded by the Boycott, Divestment, Sanctions ("BDS") Movement and echoed by the United Nations Economic and Social Commission for Western Asia ("UNESCWA").<sup>15</sup>

Part Three analyzes the principle of "self-determination" and its early twentieth century origins. This part makes a modest attempt at interpreting the terms "self-determination" and "peoples," seeking to distinguish "self-determination" from "equality." There is a political inclination to confuse self-determination with equality. As this part explains, the Nation-State Law complies with the ICCPR and the U.N. resolutions. Arabs constitute about twenty-one percent of Israel's population.<sup>16</sup> Proponents maintain that no nation grants a minority

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12. Press Release, The Knesset, *supra* note 3.

13. *Mandate for Palestine*, 2-3, League of Nations Doc. C.529M.314 1922 VI (1922).

14. *The Legal Obligations of International Governments and Corporations*, BDS, <https://www.bdsmovement.net/colonialism-and-apartheid/the-legal-obligations-of-international-governments-and-corporations> (last visited Aug. 29, 2019).

15. U.N. Econ. & Soc. Comm'n for W. Asia, *Israeli Practices towards the Palestinian People and the Question of Apartheid: Palestine and the Israeli Occupation*, Issue No. 1, at 6, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017) [hereinafter *Israeli Practices*].

16. TOI Staff, *at 70, Israel's Population is 8.842 Million, 43% of World Jewry*, TIMES ISRAEL (Apr. 16, 2018, 6:11 PM), <https://www.timesofisrael.com/at-70-israels-population-is-8-842-million-43-of-world-jewry/>.

population the right to national self-determination and cite the Basques and Kurds as a case in point.<sup>17</sup>

Part Four addresses the more deeply embedded concern of whether Israel can retain its status as a democracy while latching onto its Jewish identity.<sup>18</sup> That fear, while understandable, is overstated. Israel's Declaration of Independence guarantees the State of Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions."<sup>19</sup> The newly enacted Nation-State Law, albeit devoid of explicit mention of "equality," does not undermine those rights.

Finally, this note concludes with recommendations. While there is a justified legal argument in defense of the Nation-State Law, the optics are nevertheless poor. Israel is novel, not despite, but because of its identity as both the only Jewish nation and the only democracy in the Middle East. Hence, the scrutiny it attracts is unique.<sup>20</sup> Reinforcing the country's democratic principles need not come at the expense of preserving its Jewish identity. In the future, Israel's Jewish lawmakers must be more mindful of that balance.

## II. THE LAW'S LEGISLATIVE HISTORY AND THE STATE OF THE ISRAELI-PALESTINIAN CONFLICT

### A. *The Law's Contents*

The Nation-State Law was narrowly passed by the Knesset 62-55 with two abstentions to become one of thirteen "Basic Laws."<sup>21</sup> Israel lacks a formal Constitution akin to America's; instead it has "Basic Laws," which are quasi-constitutional amendments that "are meant to express the values of the State of Israel as a Jewish and democratic state," and "differ from ordinary laws in their status, content, and

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17. Mitchell Bard, *Understanding Israel's Nation State Law*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/understanding-israel-s-nation-state-law> (last visited Aug. 29, 2019).

18. Emma Green, *Israel's New Law Inflames the Core Tension in Its Identity*, ATLANTIC (July 21, 2018), <https://www.theatlantic.com/international/archive/2018/07/israel-nation-state-law/565712/>.

19. DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, ¶ 12 (Isr. 1948).

20. See Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, U.N. Doc. A/HRC/25/15, at 4 (2013) (acknowledging, "Israel had been subjected regularly to significant, and often politically motivated, scrutiny over the years, disproportionate to the worldwide human rights situation.").

21. Press Release, The Knesset, *supra* note 3.

form.”<sup>22</sup> The Nation-State Law joins other Basic Laws, such as Human Dignity and Liberty, which echoes the Declaration of Independence in protecting the freedom and human rights of all citizens.<sup>23</sup>

The Knesset, Israel’s Parliament, is composed of 120 members (“MKs”) – Jewish and non-Jewish – who are elected every four years through a system of proportional representation.<sup>24</sup> The newest Basic Law was the culmination of a seven-year tug of war within the Knesset that underwent revisions and even raised an unlikely intervention from President Reuven Rivlin.<sup>25</sup> The Law was spearheaded by Prime Minister Netanyahu’s Likud Party and overcame resistance from both the Zionist Union Party and the Joint List (alliance of the four Arab parties).<sup>26</sup> Together, those three parties constituted nearly sixty percent of the Knesset’s membership.<sup>27</sup>

By and large, the Nation-State Law is symbolic in nature.<sup>28</sup> For instance, though Israel is generally understood to be the Jewish homeland, the Law finally gives it legal legitimacy: “Israel is the historical homeland of the Jewish people.”<sup>29</sup> The Law details the State flag, emblem, anthem, and official calendar.<sup>30</sup>

Clearly, it was not the mundane elements of the Basic Law that caused members of the Joint List<sup>31</sup> to literally shred the Law and decry

22. *Constitution and Basic Laws*, KNESSET, [https://www.main.knesset.gov.il/About/Lexicon/Pages/heb\\_mimshal\\_hoka.aspx](https://www.main.knesset.gov.il/About/Lexicon/Pages/heb_mimshal_hoka.aspx) (last visited Aug. 28, 2019).

23. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.) [hereinafter Human Dignity and Liberty].

24. *The Electoral System in Israel*, KNESSET, <https://www.knesset.gov.il> (last visited Aug. 28, 2019).

25. See Raoul Wootliff, *In rare rebuke, Rivlin urges MKs to amend ‘discriminatory’ Jewish state bill*, TIMES OF ISRAEL (July 10, 2018, 10:03 AM), <https://www.timesofisrael.com/in-rare-rebuke-rivlin-urges-mks-to-amend-discriminatory-jewish-state-bill/>; Raoul Wootliff, *Israel Passes Jewish State Law, Enshrining ‘National Home of the Jewish People’*, TIMES OF ISRAEL (July 19, 2018, 2:58 PM), <https://www.timesofisrael.com/knesset-votes-contentious-jewish-nation-state-bill-into-law/>.

26. Press Release, The Knesset, *supra* note 3.

27. *Knesset Election Results - Twentieth Knesset*, KNESSET, [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_res20.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_res20.htm). (last visited Aug. 28, 2019).

28. See Andrew Carey & Oren Liebermann, *Israel passes controversial ‘nation-state’ bill with no mention of equality or minority rights*, CNN (July 19, 2018, 11:36 AM), <http://www.edition.cnn.com/2018/07/19/middleeast/israel-nation-state-legislation-intl/index.html> (stating “Though the law is fraught with controversy and highly symbolic”); see also Lena Masri, *Israel passes controversial Jewish nation-state law*, ABC NEWS (July 19, 2018, 11:26 AM), <http://www.abcnews.go.com/International/israel-passes-controversial-jewish-nation-state-law/story?id=56688285> (noting “The law is largely symbolic . . .”).

29. Basic Law: Israel - the Nation State of the Jewish People.

30. *Id.*

31. The Joint List became the third most powerful faction in the Knesset following the 2015 elections. See Ruth Eglash, *Israel’s Arab political parties have united for the first time*, WASH. POST (Mar. 10, 2015), [https://www.washingtonpost.com/world/middle\\_east/israels-sparring-arab-](https://www.washingtonpost.com/world/middle_east/israels-sparring-arab-)

“Apartheid.”<sup>32</sup> Rather, it was the self-determination clause, a clause that makes Hebrew the sole official language, and a clause that “encourage[s] and promote[s]” Jewish settlement.<sup>33</sup> Though Arabic no longer holds official status, the Basic Law qualifies that “[n]othing in this article shall affect the status given to the Arabic language before this law came into force.”<sup>34</sup>

### B. Reactions from the Knesset

Considering the contents of the Nation-State Law, a Basic Law, and the small number of Basic Laws generally, the reactions to the Nation-State Law’s passage were unsurprisingly charged. On one hand, a majority of Jewish Knesset members celebrated what they regarded to be a historic moment for Judaism; at long last, “[Jews] have a home,” MK Amir Ohana rejoiced.<sup>35</sup> On the other hand, others, like Joint List leader Ayman Odeh, “waved a black flag in protest.”<sup>36</sup> MK Dov Khenin (Joint List) feared for the prospect of peace and a two-state solution as the Law, he alleged, “negates the right of the Palestinian people to self-determination.”<sup>37</sup> His Joint List counterpart, MK Saeed Alkharumi, lamented, “Israel has officially entered the indistinguished club of racist, miserable and isolated countries in the world.”<sup>38</sup> MK Ohana (Likud) countered that “those who believe this law is racist are like those who think Zionism is racism.”<sup>39</sup> He went on to plead, “[e]very minority prefers to be the majority, but you are asking to become the 22nd Arab state. We are one country that is surrounded by 21 nation states of the Arab people . . . we have just one small country.”<sup>40</sup> Some Jewish MKs criticized the Nation-State Law for its frivolity and tenor of insecurity. MK Yoel Hasson asserted, “What paper do we need so that

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political-parties-have-united-for-the-first-time/2015/03/09/6f6c021a-c660-11e4-bea5-b893e7ac3fb3\_story.html. Though their coalition consisted of a diverse group ranging from Palestinian nationalists to communists to a sole Jewish member, they shared a vision that focused on improving the lives of Israel’s Arab population. *Id.* The Joint List disbanded in February 2019 after Ta’al – one of the four parties in the alliance – split. See Hassan Shaalan, *Hadash and Ta’al Arab Parties join forces ahead of elections*, YNETNEWS (Feb. 21, 2019), <https://www.ynetnews.com/articles/0,7340,L-5467724,00.html>.

32. Press Release, The Knesset, *supra* note 3.

33. Basic Law: Israel - the Nation State of the Jewish People.

34. *Id.*

35. Press Release, The Knesset, *supra* note 3.

36. Halbfinger & Kershner, *supra* note 4.

37. Press Release, The Knesset, *supra* note 3.

38. *Id.*

39. *Id.*

40. *Id.*



we will know or feel or understand that this is the state of the Jewish people?”<sup>41</sup>

Prime Minister Netanyahu tried to walk the thin line between celebration and pacification, stressing: “[t]he State of Israel is the nation-state of the Jewish people, with full equality of rights for all its citizens. This is the meaning of the words ‘Jewish and democratic state.’”<sup>42</sup> “This Basic Law does not harm the Arabic language or any minority . . . Israel is the Nation State of the Jewish people and guarantees the majority without hurting the minority,”<sup>43</sup> MK Dichter reiterated. These reactions provide a window into both the Law’s turbulent seven-year journey and the delicate nature of Israeli politics in the main.

### C. *The Current Israeli-Palestinian Climate*

The sharp divide within the four walls of the Knesset is a mirror image of the paralysis plaguing Israelis and Palestinians today. Gridlock is no foreign concept to the two parties. Since Israel’s birth in 1948, the country has witnessed the ebb and flow of war, tepid offers of peace, non-violent and violent protests, and new actors entering the scene hopeful of achieving the unthinkable peace – only to exit on the familiar road of defeat.

As of late, the cycle has repeated, and tensions have ratcheted up. Hamas—the de facto authority in the Gaza Strip—and its offspring have continued to wage terrorist attacks, resulting in heightened security measures at the border.<sup>44</sup> By the same token, Palestinians have become fed up with the Israeli military presence in the OPT, which has made the flow of travel and resources unmanageable.<sup>45</sup> Furthermore, Israelis have showed no signs of reining in settlement building in the West Bank and East Jerusalem – land upon which Palestinians hope to transform into a

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41. *Id.*

42. TOI Staff, *Netanyahu dismisses criticism of nation-state law as ‘nonsense’*, TIMES OF ISRAEL (July 29, 2018, 1:20 PM), <https://www.timesofisrael.com/netanyahu-dismisses-criticism-of-nation-state-bill-as-nonsense/>.

43. Press Release, The Knesset, *supra* note 3.

44. See Max Boot, *Don’t blame the embassy opening for the violence in Gaza. Blame Hamas.*, WASH. POST (May 16, 2018), [https://www.washingtonpost.com/opinions/global-opinions/dont-blame-the-embassy-opening-for-the-violence-in-gaza-blamehamas/2018/05/16/02d3081e-5943-11e8-858f-12becb4d6067story.html?utm\\_term=.0746ad44c980](https://www.washingtonpost.com/opinions/global-opinions/dont-blame-the-embassy-opening-for-the-violence-in-gaza-blamehamas/2018/05/16/02d3081e-5943-11e8-858f-12becb4d6067story.html?utm_term=.0746ad44c980).

45. See *Israel and Occupied Palestinian Territories*, AMNESTY INT’L, <https://www.amnestyusa.org/countries/israel-and-occupied-palestinian-territories/> (last visited Aug. 28, 2019).

future state.<sup>46</sup> Tensions reached a breaking point when the United States moved its embassy from Tel Aviv to Jerusalem in December 2017, thereby recognizing undivided Jerusalem as Israel's capital.<sup>47</sup> Palestinians took to the Gaza-Israel border in protest, where they were met by the Israel Defense Forces ("IDF").<sup>48</sup> The protests resulted in over two hundred Palestinian deaths, which had human rights organizations and the international community sounding the alarm.<sup>49</sup>

Right or wrong, Israel is no stranger to the scorn of the international community. As columnist Elliot Kaufman observed, "Israel is the only nation...which has a permanent U.N. Special Rapporteur dedicated to investigating it."<sup>50</sup> This fact, notwithstanding its hint of bias, harkens back to the point about Israel receiving unparalleled scrutiny. Recently, however, the accusations have reached new heights. UNESCWA, which comprises eighteen Arab countries, published a report on March 17, 2017 that accused Israel of "establish[ing] an apartheid regime that dominates the Palestinian people as a whole."<sup>51</sup> It should be noted that U.N. Secretary-General Antonio Guterres requested that the Commission remove the report from its website, as the report was neither reflective of his views, nor published with his consultation.<sup>52</sup> Championing the calls of apartheid is the BDS Movement, a Palestinian-led movement, which argues that "Israel is occupying and colonising Palestinian land, discriminating against Palestinian citizens of Israel and denying Palestinian refugees the right to return to their homes."<sup>53</sup> The BDS Movement also analogizes the Palestinians' situation to South African apartheid and "aims to end international support for Israeli violations of international

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46. See Ben White, *Israel's 'creeping annexation' of West Bank continues*, AL JAZEERA (Mar. 6, 2018), <https://www.aljazeera.com/news/2018/03/israel-creeping-settlements-continue-expanding-180303201420050.html>.

47. Donald J. Trump, President of the U.S., Statement by President Trump on Jerusalem (Dec. 6, 2017) [hereinafter President Trump on Jerusalem].

48. See *Gaza Protests: All the latest updates*, AL JAZEERA (Nov. 11, 2018), <https://www.aljazeera.com/news/2018/04/gaza-protest-latest-updates-180406092506561.html>.

49. *Id.*

50. Elliot Kaufman, *No One Does Anti-Israel Bias Quite Like the U.N.*, NAT'L REV. (July 1, 2017), <https://www.nationalreview.com/2017/07/un-anti-israel-bias-richard-falk-pro-iran-9-11-truther-investigates-jewish-state/#>.

51. Tom Perry, *Israel Imposes 'Apartheid Regime' on Palestinians: U.N. Report*, REUTERS (Mar. 15, 2017), <https://www.reuters.com/article/us-israel-palestinians-report/israel-imposes-apartheid-regime-on-palestinians-u-n-report-idUSKBN16M2IN>.

52. *Id.*

53. *What Is BDS?*, BDS, <https://www.bdsmovement.net/what-is-bds> (last visited Aug. 26, 2019).

law by forcing companies, institutions and governments to change their policies.”<sup>54</sup>

Even many hawks in Israel would agree that non-Jews suffer hardship. As will be discussed in greater depth, Arabs and other non-Jews are citizens of Israel who, as the Anti-Defamation League (“ADL”) illustrates, “enjoy the full range of civil and political rights, including the right to organize politically, the right to vote...serve as members of Israel’s security forces, are elected to parliament and appointed to the country’s highest courts.”<sup>55</sup> Though there is unquestionably room for improvement, given this full range of rights, the treatment of Arabs in Israel bears no equivalence to what blacks experienced in South Africa.

### III. SELF-DETERMINATION AND ITS STANDING IN THE NATION-STATE LAW

#### A. *The Origins and Evolution of Self-Determination*

Though the term “self-determination” can be traced back to the nineteenth century, it entered the international discourse in 1918 during President Woodrow Wilson’s Fourteen Points speech where he espoused his vision for the post-war world.<sup>56</sup> President Wilson declared, “[n]ational aspirations must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.”<sup>57</sup> As the leader of a vibrant democracy in his own right, President Wilson encouraged other world leaders to embrace democracy and its foundational principles of self-governance and self-fulfillment. Self-determination was not simply a respect for those principles, but also an antidote to imperialism and colonization. The collapse of the Austro-Hungarian, Russian, and Ottoman Empires, and the decolonization of countries like Canada and New Zealand, were manifestations of the people exercising their will.

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54. *Id.*

55. Anti-Defamation League [ADL], *Response to Common Inaccuracy: Israel is an Apartheid State*, <https://www.adl.org/resources/fact-sheets/response-to-common-inaccuracy-israel-is-an-apartheid-state> (last visited Aug. 26, 2019).

56. *Fourteen Points*, HISTORY (July 28, 2019), <https://www.history.com/this-day-in-history/wilson-delivers-fourteen-points-speech>.

57. Woodrow Wilson, President of the U.S., President Wilson’s Address to Congress, Analyzing German and Austrian Peace Utterances (Feb. 11, 1918), available at <http://www.gwpda.org/1918/wilpeace.html>.

It was not until World War II that the phrase gained international prominence. In 1941, echoing the post-war ambitions of his predecessor, President Roosevelt recommitted the United States, and all Allied members, to uphold self-determination via the Atlantic Charter: a joint declaration of the United States and Great Britain in which “they based their hopes for a better future for the world.”<sup>58</sup> President Roosevelt and Prime Minister Winston Churchill expressed their “desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned,” their hope that “all peoples [] choose the form of government under which they will live,” and their “wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.”<sup>59</sup> The Atlantic Charter provided the framework that the U.N. would subsequently champion.

Once the U.N. was established and the U.N. Charter was ratified, self-determination was given full international and legal legitimacy. Chapter I, Article 1, Part 2 of the U.N. Charter provides that the purpose of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .”<sup>60</sup> Further, Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) states, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>61</sup>

Self-determination was a radical idea. Properly understood, it is a peoples’ right to freely determine how they would like to be governed.<sup>62</sup> Self-determination eschewed paternalism and embraced autonomy. Notwithstanding the gradations, self-determination at its core empowered “peoples” to be writers of their own lives. As the ICCPR General Commentary states, “[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>63</sup> What was once a mere principle, now had bloomed into a binding right. Indeed, self-

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58. *1941: The Atlantic Charter*, U.N., <https://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html> (last visited Aug. 26, 2019).

59. The Atlantic Charter, U.K.-U.S., Aug. 14, 1941, 55 Stat. 1603.

60. U.N. Charter art. 1, ¶ 2.

61. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1, §2.

62. *Right of Self-Determination for Peoples*, BLACK’S LAW DICTIONARY (10th ed. 2014).

63. SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 99 (2000).

determination became both a right *erga omnes* and a *jus cogens* norm – joining prohibitions against genocide, slavery, torture and waging wars of aggression – one so fundamental that no state could derogate from it.<sup>64</sup>

### B. *The Pushback and Obscurity*

Despite its formal recognition in the U.N. Charter, self-determination was fraught with resistance. At the heart of the controversy was the scope and definition, or lack thereof, given to both “self-determination” and “peoples.”<sup>65</sup> Western powers thought it was “a vague and undefined concept, that it was a political principle rather than a legal right, that it was a collective rather than an individual right . . . .”<sup>66</sup> Did “peoples” extend only to a country’s majority population or did it encompass *all* individuals therein, as Article 1 of the ICCPR suggests? The latter sparked legitimate fear of “invocation by minorities and the consequential destruction of the sovereignty and territorial integrity of States.”<sup>67</sup> International law professor Dominic McGoldrick observes that “the drafting history clearly indicates that the [ICCPR] does not accord to minorities, as such, the right of self-determination generally”;<sup>68</sup> rather, the rights of minorities were dealt with separately in Article 27 of the ICCPR.<sup>69</sup> Article 27 provides, “ethnic, religious or linguistic minorities...shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>70</sup> Unlike Article 1, Article 27 was more tolerable as it did not threaten a State’s sovereignty. At the same time, McGoldrick acknowledges that Article 1

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64. See I.C.J. Advisory Opinion, *supra* note 9 (clarifying “that the right of peoples to self-determination is today a right *erga omnes*”); see also Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES (May 29, 2015), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml>.

65. See Daniel Thürer & Thomas Burri, *Self-Determination*, OXFORD PUB. INT’L L. (Dec. 2008), <http://www.opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> (noting “Unsurprisingly, no definition of the term ‘people’ has been generally agreed upon so far.”); Dominic McGoldrick, *The Practice and Procedure of the Human Rights Committee Under the International Covenant on Civil and Political Rights* 404 (Oct. 1988) (Unpublished Ph.D. thesis, University of Nottingham) (on file with University of Nottingham Repository) (observing “A central issue then is what constitutes a ‘people’....”).

66. McGoldrick, *supra* note 65, at 36.

67. *Id.* at 37.

68. *Id.*

69. *Id.*

70. International Covenant on Civil and Political Rights, *supra* note 6.

is ambiguous and that it “literally would not preclude a right of self-determination for a minority if that minority constituted a ‘people’.”<sup>71</sup>

Self-determination was thus viewed as an existential threat to prevailing authority and territorial stability. States feared that minorities and indigenous groups would be emboldened by the right to self-determination, especially if neighboring separatist groups were successful, to disrupt the status quo by demanding more expansive liberties or, at worst, secession from the State. What was once the forbidden fruit of the colonial period, self-determination now presented colonized peoples with a ticket to political and, perhaps, territorial emancipation.

Reconciling the contradiction between self-determination and territorial integrity presented yet another issue that lacked clear guidance. In 1970, the UNGA adopted The Declaration on Friendly Relations, which stated, “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . . .”<sup>72</sup> However, the Declaration clarified that territorial integrity would take precedence over self-determination so long as States were “conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>73</sup> In practice, sovereignty would not supersede the equal rights and self-determination of peoples if it was merely a pretext to discriminate based on race, creed or colour. Preserving colonial rule in the name of territorial integrity, like in South Africa, would not withstand even the mildest scrutiny.<sup>74</sup>

Territorial integrity notwithstanding, the dilemma over *who* can exercise the right to self-determination was still wanting for clarification. Attempts at formulating a universally accepted criterion for “peoples” have been futile as evidenced by the absence of a proposed definition by the Human Rights Council (“HRC”) and the Committee on the Elimination of Racial Discrimination (“CERD”).<sup>75</sup> To

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71. McGoldrick, *supra* note 65, at 404.

72. G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

73. *Id.*

74. See Hurst Hannum, *Legal Aspects of Self-Determination*, ENCYCLOPEDIA PRINCETONIENSIS, <https://www.pesd.princeton.edu/?q=node/254> (last visited Aug. 28, 2019).

75. JOSEPH ET AL., *supra* note 63, at 100-101.

fill the void, several working definitions have been postulated. The ICCPR General Commentary cites several, including “common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life, and consisting of a certain minimum number.”<sup>76</sup>

International court opinions offer minimal guidance and have mainly come within the context of decolonization or non-self-governing territories. The *South-West Africa Decolonization* cases (1949-1971), the seminal cases in this corpus, resulted in Namibia’s independence from South Africa, and thereby a de facto recognition of the Namibians as a beneficiary of the right to self-determination.<sup>77</sup> Likewise, in the *East Timor (Portugal v. Australia)* case, the International Court of Justice (“ICJ”) held that the people of East Timor, a non-self-governing territory occupied by Indonesia, had a right to self-determination.<sup>78</sup> Both the Namibians and the people of East Timor were granted the right to assert external self-determination to create a new state. Despite the failure to explicitly define self-determination and peoples, the overarching thread in these cases is that self-determination was not merely aspirational, but it was an attainable, fundamental human right that would not be usurped by colonial ambitions.

### C. *The Twin Faces of Self-Determination: Internal v. External (National)*

Once there is a settled beneficiary of self-determination, the question remains *how* that right is to be exercised. Self-determination consists of internal and external (or national) self-determination. “Internal self-determination may refer to various political and social rights; by contrast, external self-determination refers to full legal independence/secession for the given ‘people’ from the larger politico-legal state.”<sup>79</sup> The Declaration on Friendly Relations describes the dual forms of self-determination as “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”<sup>80</sup> The dichotomy is not one of

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76. *Id.* at 100.

77. *South-West Africa, Second Phase* (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 7 (Jul. 18).

78. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90 (June 30).

79. *Self Determination*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/self\\_determination%28internationallaw%29](https://www.law.cornell.edu/wex/self_determination%28internationallaw%29) (last visited Aug. 26, 2019) (emphasis omitted).

80. G.A. Res. 2625 (XXV), annex, *supra* note 72.

degree, but of magnitude, for the method of implementation may determine whether a people is in control of their own affairs within an existing country (internal self-determination) or may “establish a sovereign state in the territory in which it lives and where it constitutes a majority.”<sup>81</sup> The latter right is the essence of national self-determination.

Internal self-determination is a manifestation of a people’s right to shape their religious, cultural, or ethnic identity within an established state free of external influence, and it enables minority populations to freely integrate and peacefully coexist with other identifiable groups, without having to sacrifice or suppress what sets them apart.<sup>82</sup> It is more befitting of peoples like the non-Jews in Israel or the Basques in Spain, who live under a representative government where legal distinctions based on race or religion are absent.

National self-determination, on the other hand, inherently encompasses the features of internal self-determination, but not vice versa. The formation of a new state not only presupposes the existence of a group’s cognizable identity, but also the ability of the beneficiary to enjoy the full range of civil rights in the prospective state. National self-determination, as noted, only applies in the most dire circumstances. The peoples of East Timor and Namibia viewed national self-determination as the sole means of securing independence from colonial rule, not autonomy *within* Indonesia and South Africa, respectively.

It follows that petitions for national self-determination by minority populations within a democracy, like Israel or Spain, are unlikely to be recognized by the international community, irrespective of concerns over territorial integrity. Take, for example, the 1988 Canadian Supreme Court case concerning the attempted secession of Quebec from Canada. The Canadian Supreme Court held that only people who have been “blocked from the meaningful exercise of its right to self-determination internally” (i.e., colonized peoples) may assert external self-determination via secession; however, the people of Quebec did not meet that threshold because the Canadian government afforded them full civil rights.<sup>83</sup> The Court reasoned, “[a] state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is

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81. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT’L COMP. L. Q. 102, 108 (1976).

82. International Covenant on Civil and Political Rights, *supra* note 6.

83. Sterio, *supra* note 8.



entitled to the protection under international law of its territorial integrity.”<sup>84</sup> Insofar as a peoples’ right to exercise self-determination within an existing state remains unchecked and uncompromised, efforts to secede vis-à-vis national self-determination are inapposite.

#### *D. Self-Determination vs. Equality*

There is a tendency to conflate “self-determination” with “equality.” Though the concepts overlap, they are distinct. Equality is the bedrock of all nations, and though not every nation stands as the standard-bearer of equality, those that do not are the exception to the rule. The notion of equal rights is inalienable; by contrast, self-determination is not bestowed upon all individuals. Indeed, one way to distinguish equality from self-determination is that the former is an individual right guaranteed to all, whereas the latter is a collective right conferred upon “peoples” or groups with a certain identity.<sup>85</sup> A country like Spain, for example, can rightfully claim to be a vibrant democracy that upholds the equal rights of all its citizens despite not recognizing the Basques’ right to national self-determination. Likewise, Native Americans are equal citizens under the law who have a right to internal self-determination inasmuch as controlling their own affairs within the United States; however, they cannot unilaterally declare independence by exercising national self-determination. Therefore, equality and self-determination overlap insofar as self-determination encompasses equality, but the reverse is not always true.

#### *E. The Nation-State Law vs. Palestinians’ and other Non-Jews’ Right to Self-Determination in Israel*

“As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a ‘Palestinian people’ is no longer in issue” and their rights “include the right to self-determination.”<sup>86</sup> Palestinians’ right to self-determination is settled. Not only has the UNGA repeatedly recognized the Palestinians as a “people,” but it has also recognized their right to self-determination.<sup>87</sup> When taken in isolation, these conclusions seemingly render the self-

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84. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>.

85. See JOSEPH ET AL., *supra* note 63, at 100 (stating “Self-determination is the collective right of ‘peoples.’”).

86. See I.C.J. Advisory Opinion, *supra* note 9, at 50-51.

87. G.A. Res. 49/149 (Dec. 23, 1994); G.A. Res. 53/136 (Mar. 1, 1999); G.A. Res. 56/142 (Feb. 11, 2002); G.A. Res. 67/19 (Nov. 29, 2012); G.A. Res. 67/158 (Dec. 20, 2012); G.A. Res. 71/184 (Dec. 19, 2016); G.A. Res. 72/160 (Dec. 19, 2017).

determination clause in the Nation-State Law null and void. Properly understood, however, the clause wholly conforms with international law. The Law's opponents commit two critical interpretive mistakes. First, critics overlook the fact that the clause explicitly states, "in the State of *Israel*," as opposed to Israel and the Palestinian territories.<sup>88</sup> Second, the clause mentions "*national* self-determination," not internal self-determination or self-determination writ large.<sup>89</sup> When taken together, these distinctions make all the difference when measured against international law.

### 1. Self-Determination in the State of *Israel*

The self-determination clause explicitly refers to the State of Israel – not the Palestinian territories, nor the prospective Palestinian State that encompasses the Palestinian territories. In the ICJ's Advisory Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*), Judge Higgins noted, "[p]eoples' necessarily exercise their right to self-determination within their *own* territory."<sup>90</sup> The State of Israel is the 'territory' of the Jewish people – a fact established by the U.N. And so, the Nation-State Law merely formalizes the incontrovertible: Israel is the nation-state of the Jewish people, where Jews exercise their internationally recognized right to self-determination. In his September 2018 address at the U.N., Prime Minister Netanyahu recalled,

Israel is the only place where the Jewish people proudly exercise our collective right of self-determination. That right was recognized nearly a century ago by the League of Nations and over [seventy] years ago by the United Nations when it voted to . . . support the establishment of "a Jewish state."<sup>91</sup>

The British Mandate and the ensuing 1947 U.N. Partition Plan for Palestine established then-Palestine as "the Jewish national home," taking into consideration "the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."<sup>92</sup> The British Mandate and the Partition Plan, which

88. Basic Law: Israel - the Nation State of the Jewish People. (emphasis added).

89. *Id.* (emphasis added).

90. See I.C.J. Advisory Opinion (Sep. Op. Higgins), *supra* note 9, at 83 (emphasis added).

91. United Nations, *Israel – Prime Minister Addresses General Debate, 73rd Session*, YOUTUBE (Sep. 27, 2018), <https://www.youtube.com/watch?v=HTugN3Wtb28>.

92. Mandate for Palestine, art. 2, July 24, 1922, <https://www.unispal.un.org/DPA/DPR/unispal.nsf/0/2FCA2C68106F11AB05256BCF007BF3CB>; G.A. Res. 181 (II), U.N. Partition Plan for Palestine (Nov. 29, 1947), <https://www.unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>.

also created an Arab state in Eastern Palestine that was ultimately rejected by the Palestinians, recognized the Jewish people's right to self-determination in the State of Israel. International law professor Robbie Sabel keenly observed, "[t]he mandate referred to the political rights of the Jewish people, but only to the civil and religious rights of the local Arab population."<sup>93</sup> The distinction is that "the Arabs would be exercising their political rights in the new Arab states bordering Palestine while Palestine was to be designated for a future Jewish national home."<sup>94</sup> Finally, on May 14, 1948, the day the British Mandate expired, the Jews declared the establishment of Israel.<sup>95</sup>

The Nation-State Law adheres to Judge Higgins' remark: the Jewish people are exercising their exclusive right to national self-determination in their own territory, Israel. Had the drafters of the British Mandate and the Partition Plan intended for both Palestinians or non-Jewish Israelis and Jews to exercise national self-determination in the State of Israel, they would not have formed two separate states. Expecting the Israeli government to grant non-Jews the right to national self-determination in the State of Israel would challenge the land's unique status as the homeland for the Jews – the chief reason for the country's inception – and itself be at odds with international law.

Further, the U.N. resolutions reaffirm the right of the Palestinian people "to self-determination and to independence in their *State of Palestine* on the *Palestinian territory*. . . ."<sup>96</sup> The resolutions could not be any clearer in their intention. They explicitly avoid referring to Palestinian peoples' right to self-determination in the State of Israel. It would be illogical to assume the U.N. would grant the Palestinians the right to exercise national self-determination in more than one state. It is also worth noting that the resolutions do not refer to the right to self-determination of non-Palestinians, like the Druze or Bedouins. Retired Israeli Chief Justice Aharon Barak noted,

The recognition of the minority rights of Israel's Arab citizens does not grant them a national right to self-determination within the State of Israel. They are a minority whose identity and culture must be protected, but if they want to realize their

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93. Robbie Sabel, *International Legal Issues of the Arab-Israeli Conflict, An Israeli Lawyer's Position*, 3 J. EAST ASIA & INT'L L. 407, 411 (2010).

94. *Id.*

95. DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, ¶ 1.

96. G.A. Res. 67/19, Status of Palestine in the United Nations (Dec. 4, 2012) (emphasis added), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/19).

right to national self-determination, they can only do it in a state of their own, not in Israel.<sup>97</sup>

The Palestinian peoples' right to national self-determination is tied to an independent State of Palestine. Had the Nation-State Law said, "the right to national self-determination in the State of Israel *and* the Palestinian territory is unique to the Jewish people," then that would have raised a red flag. Of course, both the Israeli occupation and the settlement-building renders it unlikely for Palestinians to currently exercise national self-determination in the OPT. Prime Minister Netanyahu's inflammatory campaign rhetoric about potentially annexing parts of the West Bank adds another layer of difficulty, but it is imperative to separate the rhetoric from the law.<sup>98</sup> Additionally, the self-determination clause in and of itself does not implicate the OPT due to the clause's self-imposed territorial limits (the State of Israel), and thereby does not defy international law. Although disputes over territorial boundaries remain, Israel recognizes the Palestinians as a "people" and their aspirations for statehood.<sup>99</sup> In fact, in 1993, Israeli Prime Minister Yitzhak Rabin recognized the existence of a "Palestinian people" and their "legitimate rights," which the ICJ interpreted as the right to self-determination "in the Palestinian territory."<sup>100</sup> Rabin's recognition, coupled with the ICJ's interpretation, offered legal legitimacy to Palestinians' claims to exercise self-determination in these territories.

The United States has adopted a similar position. As recently as March of 2017, the U.S. Congress introduced a resolution "that recognize[s] Israel's right to exist and promote[s] a Palestinian state to meet the legitimate aspirations of the Palestinian people for self-determination *within their own nation*."<sup>101</sup> Therein lies the common thread tying the ICJ's Advisory Opinion, the several U.N. resolutions, and the Congressional resolution together: all plainly state that a

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97. Emmanuel Navon, *No, Aharon Barak Does Not Oppose Israel's Nation-State Law*, JERUSALEM POST (Dec. 29, 2018, 9:57 PM), <https://www.jpost.com/Opinion/No-Aharon-Barak-does-not-oppose-Israel's-Nation-State-Law-575768>.

98. See David M. Halbfinger, *As Netanyahu Seeks Reelection, the Future of the West Bank is Now on the Ballot*, N.Y. TIMES (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/world/middleeast/israel-election-netanyahu-west-bank.html>.

99. *What is Israel's Position Regarding the Creation of a Palestinian State?*, ISR. MINISTRY OF FOREIGN AFFAIRS (Dec. 30, 2009), [https://www.mfa.gov.il/mfa/foreignpolicy/issues/pages/faq\\_peace\\_process\\_with\\_palestinians\\_dec\\_2009.aspx](https://www.mfa.gov.il/mfa/foreignpolicy/issues/pages/faq_peace_process_with_palestinians_dec_2009.aspx) - Recognition2. (referencing "Palestinian territories" in response to the question "[w]hat is Israel's position regarding the creating of a Palestinian state?").

100. See I.C.J. Advisory Opinion, *supra* note 9, at 50-51 (emphasis added).

101. H.R. Res. 226, 115th Cong. (2017).

peoples should exercise their right to national self-determination within their own territory. The United States recognizes Israel's right to exist as a Jewish state and simultaneously supports a Palestinian State that neighbors, rather than inhabits, Israel. The two concepts are not mutually exclusive. Preserving Israel's identity as the one and only Jewish homeland – sanctioned by the League of Nations and the U.N. – should not be distorted into a mechanism of undercutting, or outright denying, Palestinians' right to self-determination. Taking a step back, the condemnation of Israel codifying its identity as the *one* Jewish state, while there exist *twenty-one* Arab states, without issue or objection, casts doubt on the sincerity of the criticism. In fact, though Israel is considered a Jewish state,<sup>102</sup> “Judaism is not the official religion of Israel. (It has no official religion, but *all* religious groups get funding from the government).”<sup>103</sup> Yet, Islam is the official religion of twenty nations.<sup>104</sup> The fact that all religions receive funding from the government underscores Israel's founding-era promise to uphold a religiously-tolerant democracy – a topic that will be examined in more detail. In any event, the self-determination clause merely institutionalizes the Jewish people's right to national self-determination in Israel, while still safeguarding the rights of Israel's non-Jewish citizens.

## 2. The Clause's Specific Usage of the Term *National* Self-Determination

Critics also misinterpret the self-determination clause as an outright rejection of non-Jews' ability to exercise all forms of self-determination in Israel when, in fact, the clause unambiguously states *national* self-determination – not self-determination in general. As previously explained, national self-determination refers to a people's

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102. Joel Braunold, *What is a 'Jewish State'?*, HAARETZ (Mar. 1, 2012, 5:31 PM), <https://www.haaretz.com/jewish/1.5200175> (noting that though “Jewish State” is an amorphous term, practically speaking, the term connotes a certain character and value system that reflects the principles of Judaism. With respect to Israeli politics and governance, prior to the passage of the Nation-State Law, “Former Prime Minister Ariel Sharon and Prime Minister Benjamin Netanyahu have often posed recognizing Israel as a ‘Jewish state’ as a precondition in negotiations with the Palestinians.”).

103. Eugene Kontorovich, *The Legitimacy of Israel's Nation-State Bill (I): Comparative Constitutionalism*, WASH. POST (Dec. 9, 2014) (emphasis added), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/09/the-legitimacy-of-israels-nation-state-bill-i-comparative-constitutionalism/?noredirect=on&utm\\_term=.d7bd43c400cb](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/09/the-legitimacy-of-israels-nation-state-bill-i-comparative-constitutionalism/?noredirect=on&utm_term=.d7bd43c400cb).

104. See *Can Israel be Both a Jewish State and a Democracy?* ISR. MINISTRY OF FOREIGN AFF. (Nov. 10, 2010), [http://www.mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ\\_Attack\\_Israeli\\_Values.aspx#democracy](http://www.mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Attack_Israeli_Values.aspx#democracy).

right to form their own sovereign state.<sup>105</sup> Internal self-determination refers to a people's right to control their own affairs within an existing nation.<sup>106</sup> Palestinians and other non-Jewish Israeli citizens currently exercise the right to internal self-determination.<sup>107</sup> By all accounts, Israel's non-Jewish citizens "freely determine their political status and freely pursue their economic, social and cultural development," as Article 1 of the ICCPR mandates.<sup>108</sup> Non-Jews vote without interference, pray freely, and serve in the Knesset without discrepancy.<sup>109</sup> With the right to vote, non-Jewish citizens can "choose the form of government under which they will live," as President Roosevelt envisioned.<sup>110</sup> The Israeli government draws the line at non-Jews, including Palestinians, having the right to form their own state within Israel.

Proponents of the Nation-State Law further contend that no nation grants a minority population the right to national self-determination. Eugene Kontorovich observed that seven European Union countries have comparable "nationhood" constitutional provisions, "which typically speak of the state as being the national home and locus of self-determination for the country's majority ethnic group."<sup>111</sup> The Law's supporters cite the Basques in Spain and the Kurds in Turkey and Iraq as cases in point.<sup>112</sup> In Slovenia, for example, though the Slovenian Constitution ensures "a state of all its citizens," it is nevertheless founded on the Slovenian majority's "permanent right" to self-determination.<sup>113</sup> In Latvia, though Russians constitute about twenty-five percent of the population, the Latvian Constitution upholds the "unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the

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105. See Dinstein, *supra* note 81, at 108.

106. *Id.*

107. In addition to being citizens of Israel, the Palestinian people are represented by President Mahmoud Abbas of the Palestinian Authority (PA), which governs the Gaza Strip and parts of the West Bank. See *Governance & Politics of Palestine*, FANACK (last modified Dec. 5, 2018), <https://www.fanack.com/palestine/governance-and-politics-of-palestine/>. The PA has a Parliamentary Democracy and has established its own constitution and three branches of government: legislative, executive, and judicial. *Id.* With this institutional framework in place, the Palestinian people have indicated that they are ready and able to realize full self-determination in the Palestinian territories.

108. International Covenant on Civil and Political Rights, *supra* note 6, art. 1.

109. ADL, *supra* note 55.

110. The Atlantic Charter, *supra* note 59, at 2.

111. Kontorovich, *supra* note 103.

112. Bard, *supra* note 17.

113. Raf Sanchez, *Israel Passes Divisive Law Declaring Only Jews Have Right to 'National Self-Determination'*, TELEGRAPH (July 19, 2018), <https://www.telegraph.co.uk/news/2018/07/19/israel-passes-divisive-law-declaring-jews-have-right-national/>.

existence and development of the Latvian nation, its language and culture throughout the centuries.”<sup>114</sup> Whereas these nations grant self-determination solely to their majority populations, without distinguishing between internal or external (national), Israel’s Nation-State Law exclusively grants its Jewish majority the right to *national* self-determination – a right not universally held by all peoples. In light of this, Israel’s Nation-State Law appears more moderate than the nationhood provisions of its European neighbors. “Perhaps the best evidence that Israel needs a constitutional affirmation of its status as the sovereign Jewish nation-state is the eagerness of so many to denounce as undemocratic measures that are considered mundane anywhere else.”<sup>115</sup>

Scholars maintain that even President Wilson, who championed self-determination, opposed national self-determination “and that his Wilsonian principles were only intended to democratize the multinational states and to prevent territorial changes without the consent of the population involved.”<sup>116</sup> Though Israel grants national self-determination, Israel remains a democracy, and reserves that unique right to its Jewish majority in order to prevent changes to its territory and identity. This aligns with Wilson’s purported view. Additionally, Israel is abiding by the U.N. Declaration on Friendly Relations, which honors territorial integrity so long as a government remains representative of all its citizens.<sup>117</sup> “In non-colonial struggles,” as in Israel, “territorial integrity overrides self-determination.”<sup>118</sup> Israel, as a representative democracy, has met that standard. Moreover, as the Canadian Supreme Court indicated, only a people who have been “blocked from the meaningful exercise of its right to self-determination internally”<sup>119</sup> may assert national self-determination. Non-Jews do not fall into that class. Consequently, Israel should be afforded the same “protection under international law of its territorial integrity” as Canada.<sup>120</sup>

114. Kontorovich, *supra* note 103.

115. *Id.*

116. Benyamin Neuberger, *National Self-Determination: A Theoretical Discussion*, 29 NATIONALITIES PAPERS 391, 405 (2001), [https://www.tandfonline.com/doi/pdf/10.1080/00905990120073672?casa\\_token=iYoUWNfyO3UAAAAA:3Lbibdh2\\_x7C5OxCyzs5AVf\\_SIVJQNf2WADgfEXaKu1pB69HdUz\\_mZwYhcq8atMnl38dIHm8imhXnxM](https://www.tandfonline.com/doi/pdf/10.1080/00905990120073672?casa_token=iYoUWNfyO3UAAAAA:3Lbibdh2_x7C5OxCyzs5AVf_SIVJQNf2WADgfEXaKu1pB69HdUz_mZwYhcq8atMnl38dIHm8imhXnxM).

117. G.A. Res. 2625 (XXV), *supra* note 72.

118. Marija Batistich, *The Right to Self-Determination and International Law*, 7 AUCKLAND U. L. REV. 1013, 1027 (1995), <http://www.nzlii.org/nz/journals/AukULRev/1995/7.pdf>.

119. Reference re Secession of Quebec, 2 S.C.R. at 62; Sterio, *supra* note 8.

120. Reference re Secession of Quebec, 2 S.C.R. at 60.

Therefore, allowing a non-colonized minority, equal under the law, the right to secede would not only defy logic, but it would also contravene the intent of the principle's earliest advocate, President Wilson. In Israel, Jews make up about seventy-five percent of the population, whereas Arabs constitute nearly twenty-one percent.<sup>121</sup> Author and founding editor of *The Tower Magazine*, David Hazony, posits, "what democratic country on earth offers *national* self-determination to twenty percent of its citizens?"<sup>122</sup> If a nation's minority population could assert national self-determination within an existing country, then the Basques, Kurds, and other minority populations elsewhere would be able to form their own independent countries, disrupting global political stability. Palestinians and other non-Jews do not constitute the majority in Israel. To grant them the right to exercise national self-determination defies reason.

This rationale also illuminates the usage of the term "unique." The clause states that *only* Jews have the right to *national* self-determination in Israel.<sup>123</sup> That is wholly distinct from saying *only* Jews have the right to both internal and national self-determination. The Nation-State Law does not go to that extreme. Rather, non-Jews are free to exercise internal self-determination. A nation can be fully compliant with international law and respect a peoples' right to self-determination without going so far as to recognize a right to *national* self-determination. In fact, the U.N. opposed the secession of the Croatian and Bosnian Serbs and of the Chechens but supported their right to internal self-determination "in the sense of linguistic and educational autonomy. . . ."<sup>124</sup> Non-Jews in Israel are afforded the same autonomy. If the right to exercise national self-determination in Israel was not unique to the Jewish people, then that would obscure Israel's status as the only Jewish state.

#### IV. DEMOCRACY NOT DAMNED: ISRAEL'S STATUS AS A DEMOCRACY POST-NATION-STATE LAW

Critics claim that the Nation-State Law is the death knell for democracy in Israel: by exclusively bestowing the right to national self-determination upon Jews and failing to reference equality, Israel is

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121. TOI Staff, *at 70, supra* note 16.

122. David Hazony, *Everything You've Heard About Israel's Nation State Bill Is Wrong*, FORWARD (July 23, 2018), <https://www.forward.com/opinion/406355/everything-youve-heard-about-israels-nation-state-bill-is-wrong/>.

123. Basic Law: Israel - the Nation State of the Jewish People.

124. Neuberger, *supra* note 116, at 405.



accused of relinquishing its democratic title.<sup>125</sup> Indeed, by reaffirming Israel's status as the Jewish state, critics contend that Israel has become an ethnocracy or a theocracy.<sup>126</sup> But what critics bemoan as the downfall of democracy is actually a mundane feature of most nation-states throughout the world. Tal Becker, international law expert and associate of The Washington Institute, clarifies, "[t]he term 'Jewish state' is sometimes misconceived as implying an aspiration for a Jewish theocracy. Properly understood, however, the claim seeks no more and no less than public recognition of the right of the Jewish people to self-determination in a state of their own."<sup>127</sup> That is not a revolutionary concept. Though Israel is internationally considered the home of the Jewish people, that fact had never been formally enshrined in Israeli law. The Nation-State Law now codifies it. In manifesting their own internationally recognized right to self-determination, Jews only expect the same treatment as other peoples who have sought and obtained that recognition. Yet, it appears that only the Jewish people's proclamation is questioned for being overzealous. Therein lies the fallacy of the criticism.

Critics concoct a false choice whereby the Israeli government must choose between remaining a democracy or preserving its Jewish identity. One should not come at the expense of the other; they must work hand-in-hand. That said, democracy is not black and white. The pearl-clutching over the self-determination clause and the symbolic elements of the Nation-State Law exposes a more deep-seated hypocrisy in the criticism lobbied at Israel. Why is Israel challenged when it seeks to join the host of nations who have similar nationhood provisions? As Prime Minister Netanyahu observed, "[t]here are dozens of countries that define themselves as nation-states of a particular people, even though there are many ethnic and national minorities within their borders. None of these countries are denigrated or libeled for celebrating their unique national identity. Only Israel is denigrated. Only Israel is libeled."<sup>128</sup>

Is Israel, as a sovereign nation, not entitled to the same privileges or proclamations of nationhood? As Tal Becker eloquently put it:

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125. See Green, *supra* note 18; Omri Boehm, Opinion, *Did Israel Just Stop Trying to be a Democracy?*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/opinion/israel-law-jewish-democracy-apartheid-palestinian.html?module=inline>; see also TAL BECKER, THE CLAIM FOR RECOGNITION OF ISRAEL AS A JEWISH STATE: A REASSESSMENT ix (2011), <https://www.washingtoninstitute.org/uploads/pubs/Documents/Pubs/PolicyFocus108.pdf>.

126. See Green, *supra* note 18; see also BECKER, *supra* note 125.

127. BECKER, *supra* note 125.

128. *Israel – Prime Minister Addresses General Debate*, *supra* note 91.

If the contention here is that only a Jewish nation-state cannot be democratic but that other such nation-states can be—including, for that matter, a Palestinian state—then the position is tainted by prejudice and does not merit attention. If, on the other hand, the contention is that *no* state purporting to realize the self-determination claims of a particular majority ethnic group can meet democratic standards, then the position is grounded in an arguably flawed conception of democracy.<sup>129</sup>

Merriam-Webster defines “democracy” as a “government by the people.”<sup>130</sup> By defining itself as the homeland of the Jewish people, Israel is manifesting the will of its majority population, while striving to preserve and protect the rights of its minority population. What can be more democratic?

Though the Law is devoid of any mention of equality, that does not render the promise or commitment to equality in Israel illusory. Proponents point out that the equal rights of all citizens are already enshrined in Israel’s Declaration of Independence and the Basic Law: Human Dignity and Liberty.<sup>131</sup> The Israeli Declaration of Independence states Israel “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions.”<sup>132</sup> The Basic Law on Human Dignity and Liberty echoes this sentiment, recognizing the sanctity of “fundamental human rights,” including “the principle that all persons are free.”<sup>133</sup> While the Nation-State Law is of immense significance due to its Basic Law status, not every piece of legislation requires a reaffirmation of fundamental and universally accepted principles. Not every U.S. Constitutional amendment mentions equality, or any, for that matter. Yet, America’s commitment to equality is not second-guessed. The Nation-State Law does not supplant Israel’s Declaration of Independence or the Basic Law on Human Dignity and Liberty, it supplements them.

With equality enshrined, the spotlight should turn to equity. By no means is Israel a well-oiled liberal democracy. Palestinians continue to live under oppressive conditions in the OPT. Moreover, Prime Minister Netanyahu’s rhetoric and right-wing policies cast serious doubt on

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129. BECKER, *supra* note 125, at xi.

130. *Democracy*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/democracy>.

131. BECKER, *supra* note 125.

132. DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, ¶ 12.

133. Basic Law: Human Dignity and Liberty, ¶ 1.

whether he, as Israel's leader, truly represents *all* Israeli citizens. According to the Association for Civil Rights in Israel, an Israeli human rights organization, "[o]ver half of the poor families in Israel are Arab families, and Arab municipalities constitute the poorest municipalities within Israel."<sup>134</sup> As Israel's Ministry of Foreign Affairs acknowledges, "Arab Israelis do face a certain degree of discrimination."<sup>135</sup> The Ministry qualifies that "this is not a function of Israel's legal structure as a Jewish state. Rather, this is a reflection of the difficulties faced by many minority populations in other democracies, compounded by the [Arab-Israeli] conflict."<sup>136</sup> Certainly, Israel's democracy and its leadership are flawed. Non-Jews unquestionably face discrimination, but that is typical of any minority population's experience. Discrimination is not an Israeli idiosyncrasy. By no means is that a justification; it is just the unfortunate reality. Even in America – a country that is three times Israel's senior – African Americans, Native Americans, and other minority populations continue to experience disparate treatment. That said, Israel's Jewish leaders should work steadfastly to bridge the equity chasm between Jews and non-Jews, while Israeli citizens – Jewish and non-Jewish – should hold their elected representatives accountable to ensure Israel abides by its democratic principles.

Despite its shortcomings, Israel remains a pluralistic society. People from all corners of the world, from all religions, ethnicities, and races, have the liberty to live as they please. Though Israel is always associated with Jews and Judaism, it is also home to Christians, Muslims, Druze, Bedouins, and Ethiopians.<sup>137</sup> It is also a safe haven for members of the LGBTQ community.<sup>138</sup> Arabs hold seats in the Knesset and have served on the Supreme Court, the Druze serve in the military, women have presided as judges, and one woman, Golda Meir, was elected prime minister in 1969 – a time when women in leadership roles was unfathomable.<sup>139</sup> Though Arabs face undeniable hardship,

They enjoy the highest standard of living of any Arabs in the Middle East and actively participate in the Israeli political

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134. *Arab Minority Rights*, ASS'N FOR CIV. RIGHTS IN ISR., <https://www.law.acri.org.il/en/category/arab-citizens-of-israel/arab-minority-rights/> (last visited August 29, 2019).

135. *Can Israel be Both a Jewish State and a Democracy?*, ISR. MINISTRY OF FOREIGN AFF., *supra* note 104.

136. *Id.*

137. *Israel Diversity*, ISR. MINISTRY OF FOREIGN AFF., [https://www.mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/Diversity2010-En.pdf](https://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Diversity2010-En.pdf) (last visited August 29, 2019).

138. *Id.*

139. *Id.*

process. There are Arab Parliamentarians, Arab judges including on the Supreme Court, Arab cabinet ministers, Arab heads of hospital departments, Arab university professors, [and] Arab diplomats . . . .<sup>140</sup>

Echoing this, Prime Minister Netanyahu declared:

Israel is a vibrant democracy where all its citizens – Jews and non-Jews alike – enjoy equal individual rights and these rights are guaranteed by law. In Israel, whether you're a Jew or an Arab, a Christian or a Muslim, a Druze or a Bedouin, or anything else, your individual rights are exactly the same, and they will always remain the same.<sup>141</sup>

Surely some will dismiss this as lip service, especially after the Prime Minister's more recent remark that "Israel [is] a 'Jewish, democratic state' with equal rights, but 'the nation state not of all its citizens but only of the Jewish people.'"<sup>142</sup> Though his statement alludes to the title of the Nation-State Law (Israel – *The Nation State of the Jewish People*) and he prefaced this statement by saying Israel is a democratic state, many rightfully question the Prime Minister's faithfulness to Israel's democratic principles. Although these criticisms of him may be true, they do not undermine the legality of the self-determination clause. The true measure of the Prime Minister's commitment to equal rights is whether his actions match his words. Israelis must champion a more robust body politic that properly reflects the wide range of philosophies held by its citizenry. In the end, Israelis and Palestinians will be better for it.

## V. CONCLUSION

The Basic Law: Israel – The Nation State of the Jewish People, specifically, the clause that states "[t]he exercise of the right to national self-determination in the State of Israel is unique to the Jewish People," neither violates international law nor signals an end to democracy in Israel.<sup>143</sup> Although the ICCPR notes "[a]ll peoples have the right of self-determination," the Palestinians, as "peoples," are entitled to the right to *national* self-determination in a future state, not in the State of Israel.<sup>144</sup>

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140. Sabel, *supra* note 93, at 417.

141. *Israel - Prime Minister Addresses General Debate*, *supra* note 91.

142. Agence Fr.-Presse, *Benjamin Netanyahu Says Israel is 'Not a State of all its Citizens'*, GUARDIAN (Mar. 10, 2019, 10:01 AM), <https://www.theguardian.com/world/2019/mar/10/benjamin-netanyahu-says-israel-is-not-a-state-of-all-its-citizens>.

143. Basic Law: Israel - the Nation-State of the Jewish People.

144. International Covenant on Civil and Political Rights, *supra* note 6, art. 1.

The British Mandate, the Partition Plan, and the body of international law have all recognized Israel as the homeland of the Jewish people, where Jews exercise their right to national self-determination. As minorities in Israel, Palestinians and other non-Jews, like minority populations in other nations, do not have an automatic right to exercise national self-determination.

This unique right by no means enjoins Palestinians and other non-Jewish citizens from exercising internal self-determination in Israel, nor does it strip them of their equal rights and civil liberties. Non-Jewish Israeli citizens are members of Israeli society every bit as much as Jews are. Yes, Israel's democracy has glaring weaknesses. No nation boasts a flawless democracy, nor does any nation have a monopoly on morality. Whatever inherent inequalities exist between Jews and non-Jews in Israel's socio-political structure, Israel's Jewish leaders should work tirelessly to bridge that chasm. And while Israel stands as the sole democracy in the Middle East, its democratic endeavor, however flawed, unmistakably remains a constant pursuit.

With that pursuit in mind, the Nation-State Law could have accomplished its purpose and avoided the backlash had it simply mentioned equality. Though the omission of "equality" or "equal rights" should not be construed as an indication of abdication, the Law's drafters should have foreseen the intense domestic and international scrutiny the Law has engendered. Despite reassurances that Israel will vigorously defend its status as the Middle East's sole democracy – one that cherishes the rights of each citizen – the Law failed to make even the slightest reference to equality, notwithstanding its presence in the Declaration of Independence. Such an insertion would have gone a long way to alleviate the justified concerns of Israel's non-Jewish population.

Everyone wants to witness the seeds of Israeli democracy reach full bloom, especially as *terra sancta* to Jews, Muslims, and Christians. To meet that end, and to ensure Israel remains a democracy that respects the equal rights of all its citizens, Israel should amend the Basic Law on Human Dignity and Liberty to explicitly include the word "equality," as retired Chief Justice Aharon Barak suggested.<sup>145</sup> Barak supported the Nation-State Law and had no qualms with the omission of equality, but nevertheless proposed that "the 1992 basic law on human dignity and freedom be amended to make the principle of civic equality explicit."<sup>146</sup> The U.N. also held this view prior to the passage of the Nation-State Law. In 2014, the Human Rights Committee recommended Israel

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145. Navon, *supra* note 97.

146. *Id.*

“amend its Basic Law: Human Dignity and Liberty 5752-1992 to explicitly incorporate the principle of equality and non-discrimination.”<sup>147</sup>

The Israeli High Court should adopt the same position when it reviews the Nation-State Law’s constitutionality. For the foregoing reasons, the High Court should hold that the self-determination clause complies with international law and recommend that the Knesset revise the Basic Law: Human Dignity and Liberty to explicitly reference equality. It is not a zero-sum game: Israel can recognize the Jews’ unique right to national self-determination while simultaneously reinforcing and respecting non-Jews’ right to live peacefully and equally.

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147. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of Israel, U.N. Doc. CCPR/C/ISR/CO/4 (2014), <https://www.undocs.org/CCPR/C/ISR/CO/4>.